THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
Central Division

In re BRIAN A. KITTS, Debtor.	BK Case No. 05-27158 JAB Chapter 7
J. KEVIN BIRD, Chapter 7 Trustee, Plaintiff, vs. WINTERFOX, LLC, Defendant.	Adversary Proceeding No. 06-02250

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DISTRICT OF UTAH
FILED IN THE UNITED STATES BANKRUPTCY COURT

FULL TRANSCRIPT
TRIAL
DECEMBER 7, 2009
BEFORE THE HONORABLE JUDITH A. BOULDEN

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SALT LAKE CITY, UTAH, MONDAY, DECEMBER 7, 2009, 9:04 A.M.

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(Call to order of the Court.)

THE COURT: Would you call the calendar, please.

THE CLERK: This is in the matter of Brian Arthur Kitts, Bird vs. Winterfox, LLC.

THE COURT: Would parties note their appearances.

MR. AFFLECK: Adam Affleck and Aaron Millar for Trustee Kevin Bird.

MR. JUBBER: Sara Bouley, Gary Jubber on behalf of Defendant Winterfox, Your Honor.

THE COURT: All right, Counsel, are you ready to proceed?

MR. JUBBER: I am.

MR. AFFLECK: Your Honor, might I take just a minute with this witness for a couple of questions before we go to Cross Examination?

THE COURT: All right. Sir, would you come forward and be sworn.

(The witness is sworn.)

THE CLERK: Please take the witness stand and state your name for the record.

THE WITNESS: Rob Haertel.

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DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Mr. Haertel, last time we were in trial we discussed whether certain loans may have been available to Brian Kitts in December 2004, and you testified about a hard-money loan and the timing to get a hard-money loan, and you testified about the availability of sub-prime loans and the timing to get a time necessary to obtain a sub-prime loan. Do you recall your testimony about the timing how long it would take to get a sub-prime loan?

A. I believe I said two weeks. Approximately two weeks.

Q. And would it -- could it be up to a month?

A. It could be, but it's -- during that period of time they were trying to get as many loans being booked as possible, so sometimes loans went on for a month. But it could be done in as little as two weeks.

Q. If -- if you were to assume that Mr. Kitts' property were in foreclosures at the time -- well, in early December 2004, and that a Notice of Default, the earliest Notice of Default from a lien creditor had been filed on September 20, 2004, would Mr. Kitts have had sufficient time to obtain a sub-prime loan before the foreclosure sale of his home?

A. Yes, he would have.

Q. And why do you say that?
A. Because it's greater than 30 days.
Q. And what is the time period, to your understanding of the foreclosure process from the filing of a Notice of Default to a foreclosure sale.
A. Utah law is 120 days.
Q. Thank you.
No further questions, Your Honor.
THE COURT: Mr. Jubber.
MR. JUBBER: Thank you, Your Honor.

CROSS-EXAMINATION +

BY MR. JUBBER:

Q. Mr. Haertel, you testified on Direct Examination last Thursday with Mr. Affleck that a sub-prime lender would require a formal appraisal from a certified appraiser before it would lend. Isn't that true?
A. That is correct.
Q. And you said that based upon the information you had, that you -- in your opinion, a sub-prime loan would have been available to Mr. Kitts in December 2004. Isn't that right?
A. That's correct.
Q. And isn't it true that the information that you had included an appraisal that was not performed until March of 2005?

A. That is correct.
Q. So in December of 2004, that appraisal would not have been available to Mr. Kitts, would it?
A. The appraisal that was done in March 2005, I mean, it was done after that period of time; but certainly an appraiser could have appraised it in November.
Q. But -- but there -- just answer the question, Mr. Haertel. The appraisal upon which you relied, the March 2005 appraisal, would not have been available to Mr. Kitts in December of 2004, would it?
A. No.
Q. So to your knowledge, there was no appraisal available to Mr. Kitts in December 2004, was there?
A. Not that I'm aware of.
Q. So without an appraisal in December 2004, you cannot say that Mr. Kitts would have been able to get a sub-prime loan in December 2004, can you?
A. That's an incorrect statement, sir.
Q. Well, if there was no appraisal available in 2004, he wouldn't have been able to get a loan, would he?
A. That's assuming that he wouldn't -- that he would not be able to obtain an appraisal --
Q. But there was --
A. -- in November.
Q. But there was -- but you're not aware of any

appraisal that he had. He wouldn't have been able to use the 2005 --
A. It's --
Q. -- March 2005 appraisal, would he?
A. It's standard practice for a borrower to come in without an appraisal and for a lender to order the appraisal. So I think your --
Q. But based upon the information that you had, you can't say that he would have been able to get a sub-prime loan in December of 2004, can you?
A. That's incorrect.
Q. But the information you had was a March 2005 appraisal, was it not?
A. That is correct. However, the --
Q. And isn't it true that a -- that a sub-prime lender needs an appraisal? Isn't that what you said?
A. That is true --
Q. So the --
A. -- however, the comparables on that appraisal --
Q. Just my question, sir --
A. -- were dated prior to that period of time.
Q. But the appraisal itself was not dated until March of 2005.
A. No. But the comparables existed before then, and they would have been hold up by another appraisal.

Q: But the -- but the appraisal itself was not available in March of -- excuse me -- in December 2004, was it?
A. I believe I've answered that question several times, sir.
Q. Was it available in December of 2004, sir?
A. The appraisal that I reviewed was not.
Q. Thank you.
Now, the way any lender makes money is by loaning money. Isn't that right?
A. That's correct.
Q. Okay. And from a lender's point of view, the objective is to loan money, have it repaid with interest, and then loan that money out again. Isn't that true?
A. Not necessarily. It depends on the -- on the status of the lender.
Q. Okay. But the idea is to loan the money and then have it repaid. Isn't that -- isn't that not correct?
A. Yes.
Q. And then it -- then the money is available for the lender to be able to reloan again. Is that not correct?
A. That isn't necessarily correct, because in today's mortgage market the monies actually -- the majority of the monies for the loans are coming through Wall Street, and so they're being sold off to investors. So that money's not

necessarily being recycled into another loan the same way that it would be for a private investor. If you're assuming a private investor, then what you're saying is true.

Q. Okay. Thank you. So anything that potentially gets in the way of that process would represent a risk to a private lender, isn't that -- that you would want to avoid. Isn't that true?

A. There are exceptions to that rule.

Q. But, as a general rule, is that not true?

A. As a general rule, most lenders prefer to get their money back, private -- especially private lenders, so that they can lend it again.

Q. Okay. Thank you.

So in determining whether to make a loan, particularly one in excess of $1.35 million, and one with a very favorable loan-to-value ratio, say 65 percent, any lender would take into account risk -- count the risk that it may not get its money back on the timetable that it -- that it anticipated. Isn't that true?

A. That's always a risk for any loan, sir.

Q. Okay. So, for example, if it appeared to a lender making a loan in excess of $1.35 million the lender may ultimately have to foreclose on the collateral in order to get its money back, the lender would either not make the loan or take those risks into account before making a loan.

Isn't that true?
A. That is correct.
Q. Okay. And there are additional costs associated with a foreclosure, are there not?
A. Yes.
Q. Okay. There's -- you have -- the lender would have to obtain security for the property in a foreclose. Is that not correct?
A. I'm not sure what you mean by security. The property is security for the loan.
Q. Okay. I'm talking about the -- once the -- see that the property's not vandalized, for example.
A. Oh. After they own they property or -- what is your reference?
Q. Or even during the foreclosure process. Wouldn't the lender be concerned about the -- to see that the property's not vandalized or destroyed in any way?
A. The lender has limited abilities during the foreclosure process because they don't own it still, so they do not have right to trespass upon the property.
Q. Okay. But assuming -- okay. Then after the lender's foreclosed, there would be issues relating with the security of the property?
A. Yes.
Q. There would be an expense associated with that.

Is that not correct?
A. There would be some expense, yes.
Q. And there would be the foreclosure costs --
A. Yes.
Q. -- associated with the foreclosure? And there's holding costs, are there not, associated with foreclosure?
A. Yes, there are.
Q. Okay. And then there would be insurance costs for the property?
A. That is correct.
Q. Maintenance costs?
A. Yes.
Q. And there would be utilities that would need to be paid?
A. Yes.
Q. And there's to winterize the property and -- at the appropriate time. Is that not correct?
A. That is correct.
Q. There would be costs associated with that?
A. Yes.
Q. And there would be costs associated with ultimately selling the property?
A. Yes.
Q. All right. So, typically, any lender would prefer to avoid those costs. Isn't that true?

A. Not necessarily. There are some lenders that are predatory in nature that are looking to steal properties through the lending process, and that's why there have been a number of laws passed to prevent predatory lending.
Q. But -- okay. But isn't it, as a general rule, any lender would prefer to avoid those costs. Isn't that true?
A. Yes. That's true.
Q. And the risks are greater if the amount of the loan is greater. Isn't that true?
A. Not necessarily, because as a percentage basis, those costs are smaller for a larger loan. For example, on a 1.3, $1.4 million loan, the cost to foreclose is the same as it is on a $50,000 loan. So a 3 or $4,000 cost is minimal on that large of a loan, whereas it's more substantial on a smaller loan.
Q. But the cost, for example, of insurance or selling the property, or winterizing the property and so forth, would be greater, would they not?
A. Insurance would be greater.
Q. Okay.
A. Property taxes would be greater. But I'm not sure that any of the other expenses would be greater.
Q. Utilities?
A. Utilities would be slightly larger, but not significantly.

Q. Wouldn't selling costs be larger?
A. Yes, because they're based on a percentage of the value.
Q. And, also, there's a larger amount of money that would be tied up. Is that not correct?
A. Well, all of your money would be tied up as a lender, yes.
Q. Okay. Also, possible bankruptcy by the borrower would represent a potential risk for the lender. Isn't that true?
A. That is correct.
Q. Okay. So in making a loan of over $3.5 million, even when there's a very favorable loan-to-value ratio, say 65 percent again, the risk of a possible bankruptcy is a very significant factor a lender would want to take into account. Isn't that true?
A. Lenders take that into consideration, yes.
Q. Okay. Now, you're -- you're a lawyer. Is that right?
A. No, I'm not, sir.
Q. Okay. You have a Juris Doctorate degree. Is that correct?
A. Yes, I do, sir.
Q. You received that from Concord Law School?
A. Yes, sir.

Q. You have some familiarity with Bankruptcy Law, do you not?
A. More through the lending practice over the last 30 years as a lender.
Q. Okay. You know that when a person or entity files for bankruptcy, that an automatic stay comes into effect?
A. That is correct.
Q. You're familiar with that?
A. Yes, I am.
Q. And you're familiar with the fact that when an automatic stay comes into effect, the creditor cannot then take any action to foreclose on the property until they get relief from the automatic stay?
A. That is correct.
Q. So a creditor's ability to foreclose on collateral can be significantly delayed -- significantly delayed. Isn't that correct?
A. That is correct.
Q. Okay. Sometimes for a long period of time?
A. Depending on the equity in the -- in the collateral, yes --
Q. Okay.
A. -- that could be correct.
Q. So when there's equity in the collateral that can actually represent something of an obstacle to a creditor

being -- being able to get relief from the automatic stay. Isn't that true?

A. That is correct.

Q. So the lender then can be tied up in bankruptcy court for months or even years. Isn't that true?

A. Yes.

Q. Okay. And that would be a very significant risk, particularly for a loan of approximately $1.35 million. Isn't that true?

A. I don't know that I agree with the significant risk, but I do agree that it is a risk.

Q. Okay. And also, there's a possibility in a bankruptcy case the terms of the loan can be significantly modified. Isn't that true?

A. Not on a personal residence, sir.

Q. Isn't it true, sir, that a short-term loan can be stretched out, the terms, for a longer term?

A. It's my understanding that a personal residence you cannot change the terms.

Q. Is it not true also that the interest rate could be modified?

A. I -- on a personal residence, I believe that those things cannot be modified.

Q. Was -- the residence was in the corporate name it would modify it -- be modified. Is that your understanding?

A. It would depend on whether or not the bankruptcy courts found it to be a personal residence.

Q. Okay. You're also aware that in a bankruptcy case in certain circumstances a creditor can actually borrow new money and during the course of the bankruptcy?

A. Yes.

Q. And secure that new financing with a lien senior to an existing loan. Isn't that true?

A. I do not believe that's true for a personal residence.

THE COURT: Mr. Jubber, I think maybe you misspoke yourself. You want to try that question again.

MR. JUBBER: Okay. I'm sorry.

THE COURT: A creditor.

MR. JUBBER: Did I --

THE COURT: You said creditor, I thought --

MR. JUBBER: Oh. I'm sorry.

THE COURT: -- rather than Debtor.

MR. JUBBER: Okay.

Q. You're also aware that in a bankruptcy in certain circumstances a Debtor can actually borrow new money during the course of the bankruptcy proceeding and secure that new financing with a lien senior to the existing lien. Are you aware of that?

A. I'm not aware of that. It's my understanding that

personal residences are treated differently.
Q. If I was to inform you that that would be possible in a case like this where there's equity in the property, you're not aware of that?
A. No.
Q. Okay. All of the possibilities -- all of these possibilities would be -- would pose concern to a lender, would they not?
A. Yes.
Q. Okay. Any prudent lender would want to take those risks into account before making a loan. Isn't that true?
A. Yes.
Q. Okay. Particularly a loan in the amount of approximately $1.35 million?
A. I don't know that the loan amount makes a difference here, but the lender would take into -- that into consideration, yes.
Q. Okay. So to say that a lender can always realize or sell the property doesn't take into account those risks, does it? Isn't that true?
A. The lender has the property as security, so I'm not sure that I understand your question there.
Q. Isn't it true, Mr. Haertel, that a lender -- to say that a lender can always realize or sell the property doesn't take into account the fact that -- that they might

get tied up in bankruptcy court for a significant period of time, does it?

A. Our experience has been that --

Q. Just an -- just answer the question. It doesn't take that into account, does it?

A. Would you repeat the question, please.

Q. To say that a lender can always realize or sell the property doesn't take into account the risk that he might be tied up in bankruptcy court for a significant period of time, does it?

A. Bankruptcy court delays the action.

Q. Okay. And that delay's when he get his money, doesn't it?

A. That's correct.

Q. Okay. It doesn't take into fact -- account the fact that -- that -- that the terms of the loan might be modified in the course of bankruptcy, does it?

A. What doesn't take into -- would you repeat the question.

Q. The -- to say that a lender can always realize or sell the property doesn't take into account the risk that the terms of the loan may actually be modified during the course of the bankruptcy. Isn't that true?

A. If the terms of the loan could be modified, then, of course, that would be a risk.

Q. Okay. And assuming for the moment that it doesn't take into account the risk that during the course of the bankruptcy the Debtor may, in fact, put a senior lien on that property, get new financing, doesn't take into account that risk, does it?
A. And, again, I'm familiar -- I am unfamiliar with that risk because I -- we have not experienced that in 30 years.
Q. Okay. But it wouldn't take -- to say that you always realize or sell the property wouldn't take into account that risk, would it?
A. Well, it takes into account that risk. It's -- again, it's a timing issue.
Q. When he gets his money back?
A. Yeah.
Q. Whether, in fact, he gets all the money back that he intended. Isn't that not correct?
A. Yes. That is correct.
Q. Okay. On Direct Examination by Mr. Affleck you said that income, credit, other things -- and other things, like if they filed bankruptcy, are not as critical to hard-money lenders because they're looking at the collateral. Do you recall that?
A. Yes.
Q. Okay. Now, you testi -- your -- again, your

appraisal was dated March, that you looked at, was dated March 9th of 2005. Correct?
A. That's correct.
Q. Call your attention, if you would, to what's been marked as Exhibit 79.
A. Do you know which book that would be in?
MR. JUBBER: May I approach the witness?
THE COURT: You may.
Q. (BY MR. JUBBER) Call your attention to page 5 toward the bottom of that page, paragraph 4.
A. Yes, sir.
Q. You -- I'd like you to read the first four sentences of paragraph 4 that you wrote there.
A. "The borrower would have" --
Q. Just to yourself, sir.
A. Oh. I'm sorry. Yes, sir.
Q. So you based your opinion with respect to private lender loans on the appraisal dated March 2005. Isn't that -- isn't that not correct?
A. No. That's not correct. I based my opinion on my lending experience.
Q. But isn't it true that the fourth sentence there says that you based it on the appraisal dated March 2005, the four sentences of paragraph 4?
A. It says that I based --

Q. Isn't it true? That's what it says. Isn't that true?
A. No. That's not true. It says that he would have qualified for a private --
Q. No. The fourth sentence, sir, beginning "This is."
A. Yes. It says "This is based on the appraisal dated March "2005th," and so I'm clarifying what "this" is referring to, and "this" is referring to that the borrower would have qualified --
Q. Okay. And that's --
A. -- for a private lender loan.
Q. It's referring -- it refers to the prior sentence which is your opinion, is it not?
A. Yes.
Q. Okay. And your opinion was based on the March 2005 appraisal?
A. That was one of the things it was based on.
Q. Okay. And the March 2005 appraisal would not have been available in December 2004. Isn't that correct?
A. As I explained earlier, the comparables that were in the appraisal, many of them were from 2004, and those comparables were available and we would have found those comparables.
Q. But the appraisal itself, sir, was not available

in December 2004. Is that not correct?
A. That's correct, but that's not --
Q. Thank you.
A. -- not relevant.
MR. JUBBER: Your Honor, I'd move to strike the last comment about the --
THE COURT: All right. Stricken. Mr. Jubber, I'm going to ask you, though, to allow the witness to answer --
MR. JUBBER: Thank you.
THE COURT: -- to complete his answer before you cut him off.
MR. JUBBER: Thank you.
Q. Sir, you recall your testimony that -- that income, credit, other things like if they filed bankruptcy, are not as critical to hard-money lenders?
A. That's correct.
Q. Okay. Isn't it true that those things, it's just income whether they filed bankruptcy, are still important considerations even to hard-money lenders? Isn't that true?
A. I don't know that they're important. They are considerations. They're not overriding. They're not significant considerations.
Q. But they are considerations?
A. They are considerations.
Q. And particularly for a loan of $1.35 million.

Would that not be true?
A. No. I don't know that loan amount has -- plays into that.
Q. Okay. Isn't it true that there are relatively few private lenders in the State of Utah?
A. At what time frame, sir?
Q. In December of 2004.
A. There were quite a few --
Q. Approximately how many?
A. -- private investor -- I was aware of probably 15 or 20.
Q. Okay. You testified that you inspected the property in February of this year. Is that correct?
A. That is correct.
Q. And when you were preparing your report and formulating your opinion, you were not told that the property was in foreclosure in or around December of 2004, were you?
A. I do not recall.
Q. You do not recall?
A. No.
Q. In looking at --
A. At some point in time I found that out. I don't recall exactly when I found that out.
Q. It's not reflected in your report, is it?

A. I don't believe it is.
Q. Okay. And you were not told that the property had been the subject of a bankruptcy proceeding up to just a few months prior to December 2004, were you?
A. No.
Q. Okay. And you were not told that Mr. Kitts himself had filed a bankruptcy case which was dismissed only a few months prior to December 2004, were you?
A. That I'm not sure of. I found out that information at some point in time. I don't recall if it was before --
Q. It's not --
A. -- this.
Q. Sorry. That information's not reflected in your report, is it?
A. It -- I don't -- I do not recall if it wasn't reflected because it didn't matter or because I didn't know.
Q. You're not sure when you -- when you found out that information?
A. No, I'm not.
Q. Okay. But it's not reflected in your report. Isn't that true?
A. It's reflected in the report based on the fact that I did state in the report that bankruptcy and other matters, things like that, don't necessarily matter to

hard-money lenders.

Q. So, Mr. Haertel, you testified that when you visited the property in February of 2009, you met with Mr. Kitts. Is that correct?

A. That is correct.

Q. And he told you at that time that his income back in late 2004 was $360,000 a year or $30,000 a month?

A. That's correct.

Q. Is that -- that's correct?

A. Yes.

Q. Okay. And that was one of the assumptions on which you based your opinion. Isn't that true?

A. Yes.

Q. Okay. And you said on Direct Examination that you approached this assignment by doing what you would normally do with any loan. Isn't that true?

A. That is correct.

Q. And you asked him about his income, didn't you?

A. Yes, I did.

Q. So asking about income is what you would normally do with any loan. Isn't that true?

A. It is our practice to inquire about income, but that doesn't necessarily disqualify a person from obtaining a loan. There is always repaymentability because there's equity in the property.

Q. But there's risks associated from that?
A. Yes.
Q. Okay. And so isn't it fair to say that the fact that you asked about it, it's important -- that would indicate that it was important information for you to know in making a loan. Isn't that true?
A. Not necessarily as a private investor. But I was also questioning that concerning the sub-prime lending, because the sub -- there are several sub-prime loans that require stated income whatever --
Q. You wouldn't have asked about the income unless you considered it important, at least for the sub-prime. Is that correct?
A. That's correct.
Q. Okay. And you also looked at the settlement documents for these loans. Isn't that true?
A. Yes, I did.
Q. Okay. And so you -- in formulating your opinion, you were aware that the loan was approximately for $1,389,000?
A. Yes.
Q. Okay. Did the Trustee or his counsel ever provide you with a copy of Mr. Kitts' Statement of Financial Affairs in his prior bankruptcy proceeding?
A. No.

Q. Did they -- did the Trustee or his counsel ever provide you with copies of Mr. Kitts' income tax returns for 2004?
A. No.
Q. I'd ask you to look at Exhibit 567.
And may I approach?
THE COURT: You may.
THE WITNESS: Are we done with this one?
Q. (BY MR. JUBBER) I'll represent to you, Mr. Haertel, that this has been -- this income tax return, that portion of Exhibit 567 marked at the bottom you, see Kitts 20769 probably on the previous page that's been admitted into evidence, it indicates an adjusted gross income for 2004 of just -- of $2,023. Do you see that?
A. Yes, I do.
Q. This information was not provided to you, was it?
A. No, it wasn't.
Q. Okay. Had you known that Mr. Kitts' income for 2004 was not $360,000 as he stated but, rather, only about $2,000, that would have significantly altered your opinion, would it not?
A. No, it would not.
Q. Look at, if you would, Mr. Haertel, Exhibit 596. Wouldn't you say, Mr. Haertel, that you -- that with respect to a sub-prime loan, income would be a factor? Is that not

correct?
A. Possibly. There were different sub-prime loans. If you recall my prior testimony, there was a NINA loan, which is no income no asset verification. So for some of the loans, income -- stated income is important, but it's not important as to what it is. It's important to what the borrower states.
Q. Yeah. But you included that income of $360,000 a year as one of your assumptions in formulating your report, did you not?
A. I did that so that I -- so that there would be more availability of loans to him. In other words, that would be a stated income loan, and if he would qualify for a stated income loan in addition to a NINA loan, then there are more loans available to him.
Q. Call your attention to Exhibit 596. You'll see at the -- on the second page of that exhibit, do you see what --
A. Is that the Statement of Financial Affairs?
Q. Correct.
A. Okay.
Q. Do you see that?
A. Yes, I do.
Q. Do you see the first paragraph? The Debtor is asked to report on his income for employment or operation of

business for prior years.
A. Yes.
Q. And you see that employment for -- excuse me. The income amount for the year 2001 was a negative $664,317. Do you see that?
A. I do.
Q. Okay. And do you see that for 2002 the income was a negative $2,965?
A. That's correct.
Q. Okay. And for 2003 it was a plus or minus $90,000?
A. That's correct.
Q. That information was not shown to you, was it?
A. It wasn't, but it would not change my opinion.
Q. Isn't it true, Mr. Haertel, if a potential borrower had an income of only $2,000 a month, even a hard-money lender would consider that information as -- would take that information into account in making a loan of over $1.3 million?
A. Not necessarily. Hard-money lenders are very much collateral based, so they look mainly at the property and the equity. And if the loan-to-value is low enough, such as 65 percent, then they'll do the loan regardless of the income.
Q. But if you were to make a loan of approximately

$1.3 million and you knew that the borrower had an income of only $2,000 a year, isn't it true that you would basically assume that you would be foreclosing on that loan when it matured?

A. There's something that we haven't seen here, and that's his business --

Q. But --

A. -- tax returns and things.

Q. I'm just asking you to answer just, if you would, $2,000 a year income, a loan of $1.35 million, loan-to-value 65 percent. Isn't it true that in making such a loan, you would basically assume that you would be foreclosing on that loan when it matured?

A. I don't know that I would necessarily make that assumption. There -- that certainly would be a higher probability.

Q. And you -- those are additional -- pose additional risks, would it not?

A. Yes.

Q. Okay. And you'd need to take those risks into account in determining the charges that you would have at the front end of the loan?

A. Before we made the loan as a private investor, if we felt like there was no real repaymentability, we would make -- we would have the borrower promise to list the

property and sell it.
Q. Okay. Would there be higher charges made for the loan?
A. Not necessarily.
Q. With a property of -- selling a property of the amount that you assumed from the appraisal that you saw, there are not that many people who are in the market for a $2,000,000 property. Isn't that true?
A. During what time frame, sir?
Q. Again, in 2000 -- late 2004, 2005 time frame.
A. Actually, there were -- it was a much larger market than I anticipated. If you were referring to today, I would say definitely.
Q. Isn't it true that most sub-prime lenders would want to sell the loan in the secondary market?
A. Yes.
Q. Okay. And isn't it true that there are very few sub-prime lenders in the State of Utah who would consider a loan of approximately $1.35 million to hold in their own portfolio?
A. Back in that -- well, in their own portfolio?
Q. Correct.
A. That would be a correct statement.
Q. Okay. And to sell the loan on the secondary market, the loan would have to be within conforming

guidelines established by Fanny Mae and Freddie Mac. Isn't that true?

A. That's not correct.

Q. Doesn't Fanny Mae and Freddie Mac have conforming guidelines for loans sold on the secondary market?

A. They do for conventional and FHA loans.

Q. But not for sub-prime loans you say?

A. They do -- there were different companies that were securitizing the loans at that point in time.

Q. Okay. But isn't it true that the conforming guidelines -- that in late 2004, the conforming guidelines established by Fanny Mae and Freddie Mac required that the principal amount of the loan be less than $350,000?

A. For a conforming conventional loan, that is correct.

Q. Okay. And so up to 2005, there was never a time that the conforming guidelines for Fanny Mae and Freddie Mac ever exceeded $500,000 for principal amount of the loan?

A. That is correct. But this loan was never intended to be a conforming loan.

Q. Okay. And you testified on Direct Examination about liar loans. Do you recall that?

A. Yes. Stated income loans.

Q. And you said that when people misrepresent or misstate their income --

A. Yes.
Q. -- to get a loan?
Would you agree that a difference of $2,000 in actual income versus $360,000 reported income is a very large difference? Isn't that --
A. Yes. It is a very large difference, sir.
Q. It's a multiple of 180. Isn't that true?
A. Yes.
Q. I think that works out to 180 -- excuse me -- 18,000 percent. Isn't that true?
A. That sounds correct to me, sir.
Q. Okay.
May I have just a moment, Your Honor?
THE COURT: You may.
MR. JUBBER: Thank you, Your Honor.
THE COURT: Mr. Affleck.

REDIRECT EXAMINATION +

BY MR. AFFLECK:
Q. Mr. Haertel, Winterfox's counsel asked you about an appraisal dated March 2005.
A. That's correct.
Q. In that appraisal did you review the comparable sales in that appraisal?
A. I did.
Q. And what -- what time frame were those comparable

sales?

A. Most of them were prior to this loan having been taken out. As a matter of fact, the one that was the best comparable, the closest to the property, the most comparable in size and features, my recollection was it was done -- it was sold in the summer of 2004.

Q. So if an appraisal had been done in December 2004, that appraisal would have looked very much like the March '05 appraisal that you looked at. Is that right?

MR. JUBBER: Objection, Your Honor. Foundation.

THE COURT: Sustained.

Q. (BY MR. AFFLECK) If an appraisal had been done in 2000 -- December 2004, do you know what type of -- or would comps have been available to an appraiser looking at a value on 2004?

A. Yes. They would have.

Q. And in your opinion, would it be the same comps that were contained in the March 2005 appraisal that you looked at?

MR. JUBBER: Objection, again, Your Honor. Foundation. The expert is not a -- not an appraiser.

MR. AFFLECK: I think the expert can testify -- I mean, the expert has looked at many appraisals in his business and can testify as to the type of comparable sales that are generally available for real estate appraisers, and especially since this appraisal was done in March 2005. And if the comps were available in December 2004, I think the witness can testify that, in his opinion, they would have been available to an appraiser looking at the value in December 2004.

THE COURT: I'm going to sustain the objection because I think you need to lay a better foundation as to whether the comparables in the 2005 appraisal were comparables on sales that all closed between December and -- and March of 2005. You just need to lay a foundation as to --

MR. AFFLECK: Very well.

Q. You reviewed the comparables in the March 2005 appraisal?

A. Yes, I did.

Q. And were those -- you testified, at least with respect to what you thought was the best comparable, that it occurred in the summer of 2004?

A. That's correct.

Q. You recall when the other comparables, when the closing dates were on those?

A. My recollection was that the majority of them were before that time. I believe there was one after that time and that actually was a little bit lower. I remember thinking that the appraisal very well could have come in higher if it had been done in December rather than March of

2000 -- if it had come in December of 2004 rather than March of 2005.

Q. So looking in hindsight, which we have to do in this case, if an appraiser would have been -- if an appraisal would have been ordered by a lender in December 2004, in your opinion, would the comparables, except for the one that closed after December 2004, been available to that appraiser?

A. Yes.

MR. JUBBER: Objection, again, Your Honor. Foundation.

THE COURT: I'm going to overrule the objection at this time.

THE WITNESS: Yes. Those comparables were available.

Q. (BY MR. AFFLECK) And in reviewing those comparables, it's your opinion, is it not, that the value would have been the same or perhaps even higher than the March 2005 appraisal that you looked at?

A. Yes.

MR. JUBBER: Objection, Your Honor. Lack of foundation. The witness is not -- not an appraiser.

THE COURT: Sustained.

Q. (BY MR. AFFLECK) In any event, there is no reason for you to believe that an appraisal could not have been obtained, is there?

A. No. It could have easily been obtained.

Q. And an appraisal during that time period would have looked at the comparables of sales that occurred prior to the sale. Correct?

MR. JUBBER: Objection, Your Honor. Foundation. Again, the witness is not -- doesn't know what might be looked at.

THE COURT: He's already testified; already answered it.

Q. (BY MR. AFFLECK) You would have looked at those prior --

A. Yes.

Q. -- comparables sales, right?

And all but one of them would have been available to the appraiser that was in the March 2005 report. Isn't that true?

A. That's my recollection.

Q. What kind or what type of borrowers seek hard-money loans?

MR. JUBBER: Objection. Vague.

THE COURT: To the extent the witness understands the question, he may answer.

THE WITNESS: The typical -- typically people that are looking for hard-money loans, it's either a lack of credit, lack of income, or speed. They need the loan faster than what a -- a normal lender can get it closed.

Q. So lack of credit, that would include someone who perhaps didn't have a good credit history --
A. That's correct.
Q. -- perhaps had filed bankruptcy?
A. Yes.
Q. Lack of income could be someone who was only making $2,000 a month?
A. That's correct.
Q. And speed would be someone who needed the loan right away?
A. Yes.
Q. Now, hard-money lenders, that is the environment in which they lend. Right?
A. That's correct.
Q. And if a lender has good credit or good income or doesn't need the loan immediately, they don't get a hard-money loan, do they?
A. Did you mean to say borrower?
Q. Borrower.
A. That is correct.
Q. Because a hard-money loans cost more, don't they?
A. Yes, they do.
Q. So a hard-money lender understand the risks when he makes a hard-money loan of foreclosure, of bankruptcy, of default. Isn't that correct?

A. Yes, he does.
Q. Hard-money lenders, like any other lenders, hope to get paid at the end of the loan, at the term of the loan in cash. Right?
A. That's correct.
Q. But hard-money lenders understand that there's a good possibility that they may have to foreclose?
A. Yes. There's a higher risk of foreclosure in hard-money lending.
Q. And some hard-money lenders, as you mentioned, engage in practices such as obtaining the borrower's agreement in advance that he will list the property?
A. Yes, we do.
Q. And some borrowers -- some lenders also provide deeds in lieu of foreclosure that are signed at the time of the loan. Isn't that right?
A. Only predatory lenders, sir.
Q. What kind of borrowers seek sub-prime loans?
A. Those who do not -- cannot obtain financing through the conforming markets, through Fanny Mae and Freddie Mac.
Q. Do they generally have good credit or bad credit?
A. I would say in between. Anywhere from bad to not as good as they need to have. Back in that period of time, 6 -- a 620 FICO score was what was generally required.

Q. Okay. And if a borrower had filed bankruptcy, would that exclude him? Had filed a bankruptcy and the bankruptcy had been dismissed, would that generally exclude the borrower from getting a sub-prime loan?

A. It would from a conventional loan, but not from a sub-prime loan. There were many lenders that would lend or, at least, several that would lend to a borrower a day out of bankruptcy.

Q. And Mr. Jubber asked you if the lender knew that the borrower was only -- had an annual income of $2,000 a month, would that knowledge of that on the part of a sub-prime lender prevent a sub-prime lender from making a loan?

MR. JUBBER: Your Honor, objection. Not $2,000 a month. It was $2,000 a year.

MR. AFFLECK: Excuse me.

MR. JUBBER: Misstates the -- misstates --

MR. AFFLECK: $2,000 a year.

THE WITNESS: That would not preclude a sub-prime lender under a no one could qualify or a stated loan or a NINA loan, no income no asset. They would not -- they don't look at tax returns. They ask the -- on a stated income they ask the borrower what do you make, and they accept it. That's why we, in the industry, have affectionately call them liar loans.

Q. You mentioned something called a NINA loan. What is that?
A. No income no asset. So on an application, the borrower's not required to put any income. They don't have to state income, and they don't have to put any of their assets down.
Q. And is a NINA loan a type of sub-prime loan?
A. Yes, it is.
Q. And I assume that a NINA loan probably has a little bit higher interest rate and higher points than a typical sub-prime stated-income loan?
A. At that point in time it had a slightly higher interest rate, but because they were securitizing them, the interest rates were still lower than private investor loans.
Q. I believe you testified that the sub-prime loans would have been available to Mr. Kitts in December 2004 at -- with finance charges of between 8 and 10 percent interest and 1 to 3 points. Is that --
A. 1 to 2 points.
Q. 1 to 2 points. If a loan -- if one of these sub-prime loans were a NINA loan, no income no asset loan, what would be the rate -- what would be the rate for a loan that would have been available to him at that time?
A. It would have been --
Q. Assuming that --

A. -- up on the upper end of it. Likely, the 10 percent and 2 points.

Q. No further questions.

RECROSS EXAMINATION +

BY MR. JUBBER:

Q. Mr. Haertel, I believe you testified that you're not sure, with respect to the appraisal I'm speaking of, the March 2005 appraisal, you're not sure when those closings occurred, are you?

A. I reviewed the appraisal, and I don't have it in front of me, but I do recall that the majority of the comparables were before the Winterfox loan closed.

Q. But sitting here today, you're not sure when it closed. Isn't that true?

A. I am certain that the majority closed before the Winterfox loan closed.

Q. And isn't it true, Mr. Haertel, that any sub-prime lender, including on a NINA loan, would require a formal appraisal from a certified appraiser before it could lend? Isn't that true?

A. That's correct.

MR. JUBBER: Thank you, Your Honor.

THE COURT: Anything further? Sir, you may step down.

MR. AFFLECK: Your Honor, the Trustee would like to recall George Evan Bybee.

THE COURT: Sir, would you come forward and be sworn, please.

(The witness is sworn.)

THE CLERK: Please take the witness stand and state your name for the record.

THE WITNESS: My name is George Evan Bybee.

DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Mr. Bybee, we've looked at Exhibit 10 which is the discovery responses of Winterfox signed by you under oath. In those discovery responses we asked you to produce documents relating to the Kitts loan. Do you remember that?

A. I believe so.

Q. And you produced a number of documents, didn't you?

A. I did.

Q. And you produced all of the documents that you and the lending team that you had put together had. Isn't that correct?

A. That's correct.

Q. And in those documents that you produced, there was -- well, you were here for Mr. Olivarez's testimony?

A. I was.

Q. And he testified about a Uniform Residential Loan Application that had been filled out by Mr. Kitts or by

Michael Falk on his behalf. Do you recall that?
A. I heard him testify of that, yes.
Q. And that was not one of the documents that was produced. Isn't that right?
A. Not that I know of.
Q. Okay. No further questions.
THE COURT: Anything further?
MS. BOULEY: No further questions, Your Honor.
THE COURT: Sir, you may step down.
MR. AFFLECK: Trustee calls the Trustee.
THE COURT: Mr. Bird, would you come forward and be sworn, please.
(The witness is sworn.)
THE CLERK: Please take the witness stand and state your name for the record.
THE WITNESS: My name is Kevin Bird.

DIRECT EXAMINATION +

BY MR. AFFLECK:
Q. Mr. Bird, you're the Trustee appointed in this case. Right?
A. I am.
Q. And you hired the Law Firm of Prince Yeates & Geldzahler as special counsel to assist you in prosecuting this TILA claim. Right?
A. Correct.

Q. Have you reviewed or have you been supplied a copy of fees and costs incurred in this action?
A. I have.
Q. And you have a recollection of how much has been incurred in prosecuting this action in fees and costs?
A. Yes. I believe that as of the end of last week that the fees incurred were approximately $395,000 and that the amount, after a reduction that was set forth on the accounting that I received, that the fee amounts were just in excess of $350,000.
Q. And what about costs?
A. I believe costs were approximately $21,000.
Q. And have you supplied or has your counsel supplied a copy of the accounting or the description of those fees and costs to Winterfox's counsel?
A. I believe we have.
Q. And -- may I approach the witness, Your Honor?
THE COURT: You may.
Q. (BY MR. AFFLECK) Is this the updated copy of the fees and costs provided between December 12, 2006, and December 5, 2009, the document that I've just handed you?
A. It is.
Q. And is this the document that you reviewed in connection with giving your testimony today?
A. It is.

Q. And this is the document that you testify has been supplied to Winterfox's counsel?

A. Yes.

Q. And have prior drafts of that been supplied to Winterfox's counsel as well?

A. I believe they have.

Q. In June and in November?

A. Yes.

MR. AFFLECK: Your Honor, I would ask the Court to receive the document provided to Mr. Bird and relied on him in giving his testimony to the extent it is helpful to the Court in reviewing the fees that have been incurred and the reasonableness of those fees.

MR. JUBBER: Your Honor, objection. This document, first of all, was not provided to us until an e-mail last evening and, furthermore, it's hearsay. There's a lack of foundation and authenticity objections as well.

THE COURT: Authenticity? You're just -- you mean that it's the bill? What --

MR. AFFLECK: I don't know what else --

THE COURT: How are you marking it, Mr. Affleck?

MR. AFFLECK: We have it marked as Exhibit blank, Your Honor, and we would -- we would ask the Court to receive it as the next exhibit in our exhibit list. I'm not sure what it is.

THE COURT: All right. It -- was there a prior version of this?

MR. AFFLECK: There was a version dated June and a version dated November 9th. This one is dated up -- dated up to Sunday night, and it was supplied to -- I mean, Mr. Jubber's correct. We supplied it to him only last night.

THE COURT: All right. Are the other documents in evidence?

MR. AFFLECK: The other documents are not in evidence, Your Honor.

THE COURT: Does this -- other than supplementing and adding the more recent dates, does this change --

MR. AFFLECK: No, Your Honor.

THE COURT: -- any of the entries that were previously indicated?

MR. AFFLECK: I don't believe so, Your Honor. There is -- there is time that has been deducted, time for -- time related to the preparation, filing, and seeking to obtain an amendment and supplementation of this Complaint, and an additional 7 percent across-the-board discount was given in this case. So that affects -- to the extent that that 7 percent applies to all prior fees, it does affect that.

THE COURT: All right.

MR. JUBBER: Your Honor, may I Voir Dire the witness?

THE COURT: You may. What's the number Candace? 80?

VOIR DIRE +

BY MR. JUBBER:

Q. Mr. Bird, you did not prepare this document, did you?

A. I did not.

Q. And you have no personal knowledge about the information contained within the document, do you?

A. Well, I certainly have information with respect to the fact that fees have been incurred. And to the extent that I was a party to some of the tran -- some of the entries on the application, I certainly was aware of that. I was aware that my counsel had been prosecuting this litigation, and from time to time I would inquire with respect to what the fees at that point were. So I -- I had -- I was not personally the party that prepared this document. My attorney certainly prepared it.

Q. Okay.

A. So to the extent that they represent me, I -- I assume that in my -- in that representation, this document's been prepared by the Trustee.

Q. Okay. You have no idea how many hours were spent on a particular day by a particular attorney, do you?

A. Not with respect to each --

Q. No?